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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. DAVID BENJAMIN RODGERS, Defendant and Appellant.	G035669 (Super. Ct. No. 02HF1729) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, James A. Stotler, Judge. Reversed.

Richard A. Levy, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Meagan J. Beale and Jeffrey J. Koch, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

Defendant David Benjamin Rodgers was convicted of second degree murder. A firearm allegation and two strikes were found to be true. He claims the court erroneously admitted evidence, denied his motion to allow the jury to view the scene of the crime, and failed to obtain his knowing and voluntary waiver of a jury trial on his priors; he also argues instructional error and prosecutorial misconduct. All of defendant's arguments go to his claim he should have been convicted of manslaughter, not second degree murder.

We agree admission of testimony that defendant said "he'd much rather shoot it out with the police than go to jail" was error that requires reversal. Because some of the other asserted issues may come up on retrial, we also decide there was no error in denying the jury view or refusing to instruct with CALJIC No. 3.23. We need not decide the claims of prosecutorial misconduct or waiver of jury.

FACTS

Jeanie Waterson, the victim, lived in Lancaster with her 15-year-old son, Jake Bell in the same mobile home park as defendant. Bell and Waterson were drug users. Bell was a crystal methamphetamine and marijuana addict; Waterson was addicted to methamphetamine.

When defendant met Bell, defendant had been drug free for 12 or 13 years. However within weeks of the shooting, defendant went to Bell to obtain methamphetamine. Bell suggested his mother might be able to supply him. Waterson and defendant then began to use drugs together.

About a week before the crime, defendant showed Bell a .22 caliber handgun. Defendant had also told his roommate, Tina Carson, he had a gun because "people were out to get him." According to Bell, in early December 2002, defendant started to act strangely, exhibiting paranoia and always looking over his shoulder, and

"flipp[ed] out." He told Bell "he'd much rather shoot it out with the police than go to jail." Two to three weeks before the killing, defendant stayed up four to five days. Carson confirmed defendant had been extremely paranoid during that time.

Bell testified that one evening in late December Waterson went to defendant's home to get some methamphetamine. That night both Waterson and defendant used methamphetamine. Later forensic tests showed the presence of amphetamine and methamphetamine in Waterson's blood and THCA, morphine, amphetamine, and methamphetamine in defendant's system.

The next morning defendant and Waterson were seen in a car stopped in the left turn lane of the intersection of Alton Parkway and Sand Canyon in Irvine; defendant was in the driver's seat. Scott Ferrell had stopped his SUV going in the opposite direction on Alton. Ferrell heard a noise, what he thought was either a car backfiring or a gunshot, coming from defendant's car, looked up, and saw a hole in the car's "undulating" windshield. He then saw defendant "take a gun in his right hand and point it at the upper body of the passenger of the car." Waterson "was convulsing a little bit within the confines of her seat belt," "rocking back and forth in a fairly violent fashion." During this time defendant's car began slowing moving into the intersection toward Ferrell's. Ferrell then saw defendant shoot Waterson in the head or chest; Waterson did not resist. As defendant's car continued toward Ferrell's car, Ferrell heard a third shot.

Ferrell drove a short distance away to call 911. He saw defendant's car stopped in an area off the street near the intersection; defendant then got out of the car, still holding the gun. He looked around and went to the passenger door. He was limping and his leg was bleeding.

Another driver, Jeffrey Silverstein, was also stopped at the intersection opposite defendant. He saw defendant's car coming toward him. He heard three or four shots, with a slight delay after the first, and a woman screaming. As defendant's car was moving through the intersection, he saw Waterson slumped over.

A third driver, Jim Riley, stopped his car near defendant's, and, not seeing the gun, asked defendant if he needed help. When defendant said he did, Riley went toward him. Defendant then asked Riley, "Are you a cop," and moved his hand toward his waistband where he had placed the gun. Riley saw the gun, ran back to his car, and drove away. He saw a police officer approaching and told him defendant was armed.

When the officer arrived he saw defendant near the driver's door of his own car. The officer took out his gun and ordered defendant to raise his hands. Defendant did not but instead sat in the driver's seat with his feet on the ground for approximately 15 minutes, during which time police repeatedly ordered him to drop his gun and get out of the car.

While he was sitting in his car defendant called his father from his cell phone. Defendant told him "he wasn't exactly sure where they were. . . . [T]hey thought they were being followed, . . . and then he said that . . . he was shot. . . . [H]e had the gun and was shooting, and there was a struggle over the gun . . . ." Defendant also said he did not know whether Waterson was alive or dead. He said he was "surrounded by police." Defendant "was almost between crying and – and just panic" and he "sounded shocked." At his father's urging, defendant finally left his car and complied with police demands.

After defendant was arrested, police found his revolver on the ground by the car. It had a hammer block that prevented accidental firing; the trigger had to be pulled to fire the gun. A forensic expert who conducted a trigger pull test described the trigger as being "a little bit light" but not a hair trigger.

Police interviewed defendant in the hospital where his ankle was treated; he admitted he owned the gun and said "[i]t just went off." Three bullets hit the windshield, one hit defendant in the ankle, and one struck Waterson going through her left arm and into her heart, incapacitating her within moments. The police found a bindle of methamphetamine in her pocket.

Defendant was charged with murder and an enhancement that he personally and intentionally discharged a firearm causing death. Three strikes were also alleged, felony false imprisonment in 1989 and forcible oral copulation and sodomy in 1990. The jury convicted defendant of second degree murder, finding the firearm enhancement true. After defendant waived a jury on his strikes, the court dismissed the false imprisonment strike and found true the allegations as to the other two strikes.

DISCUSSION

1. Admission of Defendant's Statement Regarding Shootout with Police

a. Erroneous Admission

Defendant contends the court erred in admitting his statement to Bell made eight or nine days before the killing that "he'd much rather shoot it out with the police than go to jail." He asserts it was inadmissible under Evidence Code section 1101, which prohibits evidence of a propensity to commit violent crimes, and under Evidence Code section 352 because it was more prejudicial than probative.

When the prosecutor first offered the statement, he argued it corroborated the testimony of Riley who said defendant asked him if he was a cop and then moved his hand toward the gun stuck in his belt. The prosecutor also claimed it showed the murder weapon belonged to defendant. Additionally, he asserted it "has a bearing on an implied-malice theory where the defendant certainly is aware of his own mindset days before the murder, is aware that he is prepared to shoot another human being, yet still continues to do these drugs, still chooses to arm himself on the day that he goes to Irvine . . . ." Finally the prosecutor maintained "it goes specifically to the malice aforethought with this victim, in the sense that it negates any argument that this was an accidental shooting, or at least aids in negating that for the People."

The court excluded the statement, noting that shooting Waterson was not the equivalent to a threat to shoot a police officer and that Riley's statement needed no corroboration because uncontradicted. It also observed there was "a logical disconnect" between defendant stating he would shoot an officer if he saw him and then shooting another person. The court found that the "prejudicial impact of the statement is huge; it outweighs its probative value at this point in trial."

Later, when defense counsel cross-examined Bell, he testified defendant had been paranoid during the two weeks before the shooting and had shown him a .22 caliber gun. The prosecutor renewed his motion to admit the statement, arguing that in direct examination of Bell he had not asked about defendant's paranoia, but defendant had opened the door "to the dark and violent aspect of that paranoia . . . ." He asserted that "part of this paranoia is that he has expressed a willingness to shoot at human beings if the circumstances are right," and the prosecutor was "entitled to show that that part of his paranoia goes to the specific intent to kill because there's a homicidal aspect to his paranoia."

After Bell testified to the statement outside the jury's presence, the court agreed it could come in because it went to defendant's "paranoia or non-paranoia, . . . part of his mental makeup nine to ten days earlier." It found the statement had "logical relevance" and was more probative than prejudicial. Bell's original testimony was that defendant stated he would rather shoot a cop than go *back* to jail. The court required that the word "back" not be stated in front of the jury.

Evidence Code section 1101, subdivision (a) provides generally that "evidence of a person's character or a trait of his . . . character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his . . . conduct) is inadmissible when offered to prove his . . . conduct on a specified occasion." "Evidence . . . is excluded [under this section] because of its highly prejudicial nature. . . . Evidence of a defendant's statement regarding possible future criminal

conduct in a hypothetical situation has at least as great a potential for prejudice in suggesting a propensity to commit crime as evidence of other crimes[, which is also inadmissible]. Therefore, the content of and circumstances in which such statements are made must be carefully examined both in determining whether the statements fall within the state-of-mind exception, as circumstantial evidence that defendant acted in accordance with his stated intent, and in assessing whether the probative value of the evidence outweighs that potential prejudicial effect." (*People v. Karis* (1988) 46 Cal.3d 612, 636.) We agree with defendant that the statement in question is inadmissible character evidence.

Preliminarily we note that this issue was not waived by defendant offering evidence of his paranoia. On appeal the People do not argue waiver, and the statement is not so closely related to defendant's paranoia that its admission was justified despite any other reasons for exclusion.

The People assert the statement was "relevant to the issue of whether [defendant] was truly operating under a compromised mental state when he shot Waterson." Specifically, they claim it was necessary to "counteract any impression that [defendant's] paranoia prevented him from forming the intent to murder," and the statement "showed that despite his paranoia, [defendant] was rational and fully capable of deliberating and premeditating a murder." However, defendant argues he is not asserting he was incapable of forming intent, but rather that his paranoia prevented him from actually forming it.

The prosecutor's arguments confirm the statement was offered to show a violent character. "[A] willingness to shoot human beings" is a character trait, as is "a homicidal aspect to . . . paranoia," not evidence of intent to shoot Waterson, who was not a police officer. Whether defendant was willing to shoot a police officer does not bear at all on whether he is paranoid. And defendant was not disputing he was paranoid; he was asserting it. Thus that was not an issue.

Further, nothing in the statement shows defendant had formed an intent to shoot anyone else. Moreover, the goal reflected by defendant's statement was to avoid going to jail. There is no evidence defendant believed killing Waterson effected that purpose. The same "logical disconnect" between the statement and the shooting remained when the statement was found to be admissible as when it was originally excluded.

The court's attempt to cure the impropriety of the statement by redacting the word "back" so the jury would not assume defendant's propensity to commit violent crimes did not go far enough. Whether or not defendant had ever been in prison, the statement still made it plain defendant was a violent person who would rather kill than go to prison. And, as defendant points out, the statement is more odious because defendant would be thought of as a "cop-killer" (italics omitted), a crime often perceived to be worse than killing a civilian. (See *Odle v. Superior Court* (1982) 32 Cal.3d 932, 942 ["Communities undoubtedly have special hostility toward 'cop killers'"].)

The People rely on *People v. Karis*, *supra*, 46 Cal.3d 612, where the court allowed admission of the defendant's statement that he "would not hesitate to eliminate witnesses if he committed a crime." (*Id*. at p. 634.) A few days after making the statement the defendant kidnapped two women, raped one, killed one, and tried to kill the other. He told the victims "he had to kill them so that he would not be killed." (*Id*. at p. 623.) At trial defendant denied committing the crimes.

The Supreme Court stated "that statements of intent of this nature, reflecting intent to kill a particular category of victims in specific circumstances, fall within the state-of-mind exception to the hearsay rule. (Evid. Code, § 1250.) The evidence is therefore admissible unless the circumstances in which the statements were made, the lapse of time, or other evidence suggests that the state of mind was transitory and no longer existed at the time of the charged offense." (*People v. Karis*, *supra*,

46 Cal.3d at p. 637.) The court reasoned that evidence the defendant was so afraid of returning to prison he would kill a witness to any future crimes was relevant under the facts of that case. "As evidence of motive, it could be circumstantial evidence of identity. It could also be circumstantial evidence that when he shot [the victims], he intended to kill, harbored malice, and killed . . . with deliberation and premeditation." (*Id*. at p. 636, fn. omitted.)

Our case is distinguishable. First, there is no issue of identity. Second, as discussed above, there is no evidence defendant shot Waterson to avoid going to prison. Finally, Waterson was not within the category of persons targeted by the defendant's generic threat.

In its analysis, *Karis* relied on *People v. Rodriguez* (1986) 42 Cal.3d 730. There, in affirming convictions for the murder of two highway patrol officers, the court held proper admission of a statement by the defendant "that he would kill any officer who attempted to arrest him." (*Id*. at p. 756.) In so doing it reasoned that a defendant's threat against the victim is relevant to show intent in a murder case, and a generic threat demonstrates intent where other evidence ties the victim to the threat. In our case defendant made no threats against Waterson, and no evidence tied her to defendant's statement about shooting police.

Nor is this case apposite to *People v. Lang* (1989) 49 Cal.3d 991, where the defendant, when asked why he carried a gun, said, "I'll waste any mother fucker that screws with me." (*Id*. at p. 1013.) The court found the statement admissible because it showed the defendant had "a preexisting intent to kill anyone who interfered with him or thwarted his desires or plans or, in other words, to kill on slight provocation under circumstances where he had no right of self-defense." (*Id*. at pp. 1015, 1016.) Here, on the other hand, defendant's statement was limited to killing an officer rather than going to prison. Thus, the statement did nothing more than show defendant had a propensity to kill making it inadmissible under Evidence Code section 1101, subdivision (a).

b. Prejudice

Defendant contends admission of the evidence violated his due process rights under the Fourteenth Amendment and, as a result, must be evaluated under the *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705] harmless beyond a reasonable doubt standard. The People disagree, asserting the test in *People* v. *Watson* (1956) 46 Cal.2d 818, 836 should be used, that is, whether it is reasonably probable that defendant would have obtained a more favorable result had the statement not been admitted. We need not resolve this dispute because admission of the statement was prejudicial under either standard.

The primary issue at trial was whether defendant had committed murder or manslaughter. Defendant focused on his claim he had not formed the intent to commit murder. The prosecutor, however, emphasized the statement, mentioning it once in the initial close and twice in rebuttal. He set out a scenario built around the statement.

"[W]hat evidence do we have of first degree [murder]? [¶] . . . [A] week before he murdered that woman [defendant] was having a conversation about shooting it out with the cops; 'I'd rather shoot it out with the police than go to jail.' All right, right there, ladies and gentleman, in his little meth binge that he's on, he is thinking about killing somebody and the consequences . . . . [¶] . . . I believe the testimony was that it was seven days before. . . . So this is an ongoing thing; he's got plenty of time. He decides to keep taking meth, he arms himself with two guns, one being one of the most powerful handguns in the world, a .357 magnum, he loads it with six live rounds, presumably." "What does he do? He starts cranking rounds off, fires - - pulls that trigger once, pulls the trigger again, pulls the trigger again. We know of at least three shots beforehand, and then he aims it at [Waterson's] chest and pulls the trigger again . . . ."

Again the prosecutor argued, "Seven days before he killed [Waterson] in the height of his meth binge is when that statement was made, and in reaction to that, he decided to arm himself. [¶] Now, when you consider his intent on that day, especially

when you figure out whether or not there was . . . premeditation and deliberation, he's thinking about it. . . . Part of that guy's program when he does meth is, he thinks about killing people. And we've got evidence of that . . . ."

It is apparent from the closing argument that the statement was central to the prosecution's case. Absent the statement, there was little other evidence of an intentional shooting. Ferrell, the only eyewitness, testified he saw defendant point a gun at Waterson. The prosecutor also referred to defendant's conversation with his father right after the shooting, emphasizing that defendant did not mention provocation or self-defense. He claimed that if those circumstances were present, defendant surely would have said something. But this is thin, especially in light of defendant's arguments about the shooting.

Defense counsel discussed defendant's drug use, discounting the prosecutor's argument that it was part of defendant's plan to kill, and arguing that defendant and Waterson used methamphetamine "because they were both dopers, simple as that." He asserted that the only evidence of why defendant and Waterson had gone to Irvine was to buy drugs, relying on Bell's statement to the police that he believed that was the only plausible reason.

Counsel commented that defendant had no reason to kill Waterson – they were friends. He noted that if defendant's intent had been to kill Waterson, he could have done so in a remote area near Lancaster where he easily could have hidden the body. That he killed her at a busy intersection in Irvine in late morning where witnesses were likely showed lack of intent.

He also highlighted that defendant took five shots, only one of which hit Waterson, with another hitting himself. Counsel argued that defendant, high on methamphetamine, shot himself in the foot first, which excited or aroused his passion, causing him to fire more shots. In his paranoid, irrational state, he would believe Waterson shot him and react accordingly. He pointed to the testimony that there was a

gap between the first shot and the other four to support this theory. He also called attention to the fact that three other shots went into the windshield, more evidence of defendant reacting and not intentionally shooting at Waterson. He argued the evidence supported a finding defendant and Waterson had struggled for the gun after the first shot and pointed to evidence of bruising on Waterson's arm. And he mentioned the light trigger on the gun.

Counsel pointed to CALJIC No. 4.21.1, which provides that jurors should consider defendant's intoxication at the time of the killing in determining whether he had the required intent, and if they have a reasonable doubt as to that intent, they must find there was none. He also emphasized CALJIC No. 2.01, which states that where circumstantial evidence allows two reasonable interpretations, one guilty and one not guilty, the jury must select the one showing innocence.

Defendant's lawyer also discounted Ferrell's testimony, claiming Ferrell was 170 feet away, which would impede his view of events, and did not see what defendant and Waterson were doing before the first shot. He noted Ferrell testified to only three shots when there were actually five. Counsel stated Silverstein testified defendant's car never stopped before proceeding through the intersection, contrary to Ferrell's testimony. Further, Ferrell testified Waterson had her seat belt on whereas an officer at the scene said it was off.

Thus, defendant presented a reasonable interpretation of the evidence that he had not formed an intent to kill. The threat to kill a police officer had to have weighed strongly in the jury's deliberations. Based on the lack of strong evidence of intent, it is more likely the jury would have agreed with defendant's theory of the events had the statement been excluded. The jury struggled with intent, as can be reasonably inferred from its request for 11 copies, in addition to the set they already had, of instructions on malice, manslaughter, voluntary manslaughter, and second degree murder. Under all of

these facts and circumstances, but for introduction of the statement, it was reasonably probable defendant would have obtained a more favorable result.

2. Jury View of the Scene

Defendant asserts the court erred when it denied his motion to have the jury view the scene of the crime. He claims a view was the only way jurors could decide how well Ferrell could have seen the events in the car. We disagree.

Defendant contends Ferrell was a crucial witness because he was the only person who actually saw what happened in the car when Waterson was shot. Thus, he continues, his testimony was paramount in the determination of whether the shooting was murder or manslaughter. Ferrell said he saw defendant point a gun at Waterson. Defendant sought to show he did not have a clear view of the inside of defendant's car.

As defendant acknowledges, a motion to view the scene is left to the sound discretion of the court. (Pen. Code, § 1119 [jury may be allowed to visit scene when court believes it proper]; *People v. Lawley* (2002) 27 Cal.4th 102, 158].) In denying the motion the court explained that there would be a "problem of trying to imitate the circumstances" of Ferrell's observation. Specifically it referred to the fact that Ferrell was in an SUV, higher than in a normal-sized car, and the jurors would not be in a car. Further, the view might be at a different time of day and under different weather conditions. The court expressed concern these differences could cause jurors to speculate about the event. Further, it stated, defendant could submit photographs of the intersection.

Defendant contends these reasons were insufficient to uphold the ruling. He argues cases do not require factors to be identical, and that certain conditions, such as the brightness of the day, could be duplicated. In addition, he complains that pictures and measurements of the intersection were not adequate substitutes, pointing out that not all jurors understand theoretical distances, and that the prosecutor suggested the photographs

had been doctored. Finally, he maintains, the court did not properly take into consideration the fact that Ferrell was the only eyewitness.

These arguments are not compelling. The court's concerns about an accurate recreation were legitimate. That a grant of the motion might have been proper does not mean the denial was an abuse of discretion. Defendant has not met his burden to show the decision was arbitrary or capricious, causing a patent miscarriage of justice. (*People v. Lawley, supra,* 27 Cal.4th at p. 158.) It was defendant's responsibility to facilitate juror's understandings of distances. Further, defendant cross-examined Ferrell and in closing argument pointed out the discrepancies in his testimony. Likewise, the prosecution's attempt to discredit defendant's pictures and measurements is an everyday occurrence in trial, which defendant had the opportunity to counter.

Nor did denial of the motion impinge on defendant's due process rights. The case on which defendant relies, *Bundy v. Dugger* (11th Cir. 1988) 850 F.2d 1402, supports our decision. While it did state an evidentiary ruling could affect due process, it held denial of a jury view of the crime scene did not deprive defendant of due process because photographs were admitted and cross-examination occurred. (*Id*. at pp. 1421-1422.) That is the case here, defendant's arguments to the contrary notwithstanding.

Because this is a matter left to the trial court's discretion, on retrial the court is free to allow or disallow a jury view as it sees fit and is not bound by our decision in this opinion affirming denial of the view in the original trial.

3. Failure to Instruct with CALJIC No. 3.32

Defendant claims the court erred by failing to instruct the jury with CALJIC No. 3.32, to support his position that his paranoia on the day of the killing was a basis for imperfect self-defense. CALJIC No. 3.32 states: "You have received evidence regarding a [mental disease] [mental defect] [or] [mental disorder] of the defendant . . . at the time of the commission of the crime charged . . . . You should consider this evidence

solely for the purpose of determining whether the defendant . . . actually formed [the required specific intent,] [premeditated, deliberated] [or] [harbored malice aforethought] which is an element of the crime charged . . . ."

This instruction "is in the nature of a pinpoint instruction that is required to be given only on request where the evidence supports the defense theory. [Citation.]" (*People v. Moore* (2002) 96 Cal.App.4th 1105, 1115-1116.) In *Moore*, the defendant was convicted of attempted murder. At trial he testified that he had smoked rock cocaine almost the entire night before the crime, which left him feeling depressed and paranoid, causing him to stab the victim. A psychiatrist, called by the defendant, testified that it was common for a chronic user of that drug to have delusions, hear voices, and hallucinate. The trial court refused to give No. 3.32.

On appeal, the court affirmed on the ground "there was insufficient evidence that defendant suffered from any mental disease, defect, or disorder at the time of commission of the offense." (*People v. Moore*, *supra*, 96 Cal.App.4th at p. 1114.) It noted that the psychiatrist neither examined the defendant nor opined that he was suffering from a mental disease, defect or disorder at the time of the crime. (*Id*. at p. 1116.) "Expert medical testimony is necessary to establish a defendant suffered from a mental disease, mental defect, or mental disorder because jurors cannot make such a determination from common experience. [Citation.]" (*Id*. at p. 1117.)

Defendant claims that the holding in *Moore* is limited because there the defendant relied on a medical diagnosis from the psychiatrist, whereas here defendant's delusions "are obvious even to laymen." Thus, even if expert testimony was required, defendant's roommate, Carson, qualified as an expert. She had known defendant for eight years, had used methamphetamine herself, and had seen others in her family experience its effects, including paranoia, as well. Carson testified that two to three weeks before the killing, defendant exhibited "major paranoia" and told her he had purchased a gun because "people were out to get him." Defendant also points to Bell's

testimony that during the two weeks prior, defendant was "always looking over his shoulder. In addition, defendant's father noticed defendant becoming "disoriented and confused."

However, none of this testimony dealt with defendant's mental state at the time of the killing. That is the evidence required to trigger instructing with CALJIC No. 3.32, which speaks of a mental defect, disorder, or disease "at the time of the commission of the crime." It is pure speculation that, as defendant argues, because he was delusional two or three weeks before the crime, he would also suffer from this condition at the time of the shooting.

Neither the statement to his father immediately after the shooting that he thought he was being followed nor the facts that he shot wildly and in a intersection in the middle of the day were sufficient to trigger the instruction. Failure to instruct with CALJIC No. 3.32 was not error.

DISPOSITION

The judgment is reversed.

RYLAARSDAM, J.

WE CONCUR:

SILLS, P. J.

ARONSON, J.